

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)	
)	
Opinion requested by:)	
Charles F. Leach,)	No. 76-092
Assistant City Attorney,)	Sept. 6, 1978
City of Bakersfield)	
)	

BY THE COMMISSION: We have been asked the following questions by Bakersfield Assistant City Attorney Charles F. Leach:

(1) Is either the Downtown Business Association or the Chamber of Commerce a city agency which is required to promulgate a conflict of interest code?

(2) Are the employees or board members of either the Downtown Business Association or the Chamber of Commerce "consultants" who must be designated employees under the City's conflict of interest code?

CONCLUSION

(1) Neither the Downtown Business Association nor the Chamber of Commerce is a local government agency. Therefore, neither organization need adopt a conflict of interest code.

(2) The employees and board members of the Downtown Business Association and the Chamber of Commerce are not consultants and need not be included in the City's conflict of interest code.

FACTS

Chapter 6.50 of the Bakersfield Municipal Code imposes a tax on businesses located in a business promotion district for the purpose of raising funds for use in promoting public events in the district and the business climate generally. Chapter 6.50 also provides that the Bakersfield City Council ("City Council") shall have the sole discretion to determine how revenues derived from the tax shall be spent within the scope of the named purposes. However, the City Council may appoint existing advisory boards or commissions to make recommendations with respect to the expenditure of

such funds or create advisory boards or commissions for this purpose. All members of such advisory bodies must be involved in conducting business activities within the business promotion district.

Pursuant to the authority vested in it by Chapter 6.50, the City Council established a business promotion district, levied the additional tax and determined how the tax proceeds should be expended. In 1973, the City Council entered into a contract with the Bakersfield Downtown Business Association, a nonprofit corporation, for the purpose of providing administrative services to the business promotion district. Of the businesses subject to the tax, approximately one-quarter are members of the Association.

In administering the promotion program, the Downtown Business Association decorates public places, promotes public events, furnishes music in public places, provides financial assistance to the Bakersfield Community Redevelopment Agency, advertises the Downtown business district, and acquires, maintains and constructs public improvements (other than vehicular parking) within the business promotion district. Under the 1973 contract, the Downtown Business Association is required to prepare a budget for submission to the City annually. The City may accept, reject or modify the budget and the various promotional programs proposed by the Association. Payments under the contract are made to the Association on a quarterly basis after the City Council reviews the Association's quarterly progress reports. The contract is for an indefinite period and may be canceled by either party on 90 days notice.

The City of Bakersfield also has entered into a contract with the Greater Bakersfield Chamber of Commerce to operate a convention bureau. The contract incorporates Section 5.32 of the Municipal Code which establishes the Auditorium Committee and provides that the manager of the Convention Bureau shall be a nonvoting ex officio member of the committee. The ordinance also ensures that the Convention Bureau and the Auditorium Committee will cooperate on all matters regarding scheduling and record keeping. The auditorium may be used without charge by conventions which are booked with the Convention Bureau.

The City and the Chamber of Commerce have entered into an additional contract for the purpose of promoting immigration to Bakersfield. In connection with this contract, the Chamber prepares a survey of the City with emphasis on industrial location factors, types of industry which are best suited to Bakersfield, economic patterns and similar matters.

With respect to both of the City's contracts with the Chamber of Commerce, payment is provided on the basis of actual itemized expenditures. Payments under the first contract are not to exceed \$35,000 and payments on the second contract are not to exceed \$20,000.

In light of these facts, Mr. Leach asks whether the Downtown Business Association or Chamber of Commerce is an agency which must promulgate a conflict of interest code and whether any of the employees or board members of the two organizations are "consultants" who must be designated in the City's conflict of interest code.

ANALYSIS

(1) The Political Reform Act ("Act") in Government Code Section 87300^{1/} provides that every agency must promulgate and adopt a conflict of interest code. The term "agency" (Section 82003) includes the term "local government agency" which is defined by Section 82041 to include:

... a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of these, but does not include any court or any agency in the judicial branch of government.

Therefore, if either the Downtown Business Association or the Chamber of Commerce is to be required to adopt a conflict of interest code, it first must be a "local government agency."

In an opinion requested by Samuel Siegel, City Attorney of Pico Rivera, 3 FPPC Opinions 62 (No. 76-054, July 6, 1977), the Commission concluded that the Pico Rivera Water Development Corporation is a local government agency. In so doing, the Commission enumerated criteria for determining whether an entity is governmental in character. Applying these standards, we conclude that neither the Downtown Business Association nor the Chamber of Commerce is a local government agency. Therefore, neither organization need adopt a conflict of interest code.

The first criterion is whether the impetus for formation of the entity was with a governmental body. In the case of the Pico Rivera Water Development Corporation

^{1/} All statutory references are to the Government Code unless otherwise noted.

(the "Corporation"), the idea for formation originated with the City and the sole purpose for its existence was to assist the City in obtaining control over its water supply. The Downtown Business Association and Chamber of Commerce, on the other hand, were in existence well before the adoption of the municipal ordinances authorizing the contracts in question. Also, the primary purpose of both the Association and the Chamber is nongovernmental in character and is unrelated to the contracts described above.

The second criterion is whether all or most of the entity's funds are received from public sources. In the case of the Corporation, rent payments from the City were guaranteed to retire the principal and interest payments on the bonds which the Corporation had originally issued to purchase the water system. The City was the only ongoing source of revenue to the Corporation. In the instant case, both the Association and the Chamber receive their operating funds from private sources. The City of Bakersfield provides only that amount of money necessary to reimburse the Association and the Chamber for their costs incurred in performing the services contracted for by the City.

The third criterion is whether the entity is performing a function which public agencies are legally authorized to perform or which they traditionally have performed. The Corporation in the Siegel opinion was clearly involved in a traditionally public activity--the operation and maintenance of a water system. Moreover, the water system in question was being operated exclusively by employees of the City of Pico Rivera. Once again, the contrast between the Corporation, on the one hand, and the Association and Chamber, on the other, is clear. Although promotion of the downtown business district, promotion of the City and the operation of the Convention Bureau are activities sometimes performed by cities, they are performed by nongovernmental entities equally as often. Thus, the Association and the Chamber are performing services which benefit the public, although, more specifically, they benefit the downtown business area and retail stores, restaurants and hotels located throughout the City. In this respect, the services which are rendered are less public in nature than the providing of a public water supply.

The last criterion is whether the entities are treated as "public" by other statutory provisions. The corporation at issue in the Siegel opinion was recognized as a public body in both tax and securities laws. While both the Association and the Chamber enjoy special tax status different from business entities, neither is viewed as public in nature by the tax laws.

In summary, neither the Downtown Business Association nor the Chamber of Commerce satisfy the four criteria specified in the Siegel opinion to the same degree as did the Pico Rivera Water Development Corporation. Although it is true that both the Association and the Chamber perform certain functions for the City which presumably are beneficial to the public, we do not think that these activities raise otherwise private entities to the level of public agencies. Accordingly, we conclude that neither the Downtown Business Association nor the Chamber of Commerce is a local government agency within the meaning of Section of 82041.

(2) We must determine whether employees or board members of the Downtown Business Association or the Chamber of Commerce are "consultants" within the meaning of the Act and, therefore, must be designated employees in the City's conflict of interest code.

The Commission defined the term "consultant" in a regulation, 2 Cal. Adm. Code Section 18700(a)(2):

"Consultant" shall include any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that "consultant" shall not include a person who:

(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendations or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and

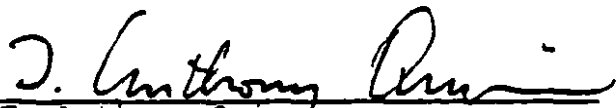
(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.

Applying the standards set forth in this regulation, we conclude that the employees and board members of the Downtown Business Association and the Chamber of Commerce are not consultants within the meaning of the Act. Initially, the definition of "consultant" is designed to cover persons who provide information, advice, recommendations or counsel under contract. Typically, consultants are hired to perform studies, audits or evaluations. In the instant case, the two entities in question have been retained to perform specific services designed to benefit the downtown business district and the City's general business population. To the extent

that these organizations provide information, advice, recommendations or counsel, such activities represent a minor portion of the activities for which they are compensated.

Even though the employees and board members do not perform traditional consultant services, we think they would be consultants within the meaning of the Act if they make governmental decisions or act as quasi-employees of the City. However, in the instant case, we believe that only the City makes the governmental decisions. That is, the City has decided that it wishes to promote the downtown business district and business generally in the City of Bakersfield. In order to accomplish this purpose, it instituted a tax on downtown businesses and hired the Downtown Business Association and the Chamber of Commerce to perform certain services. In carrying out these services, we believe they were performing services for the City but not as public officials. Instead, they were performing private services in their private capacities which were contracted for by the City because these services were believed to be beneficial to the public. As such, these contracts are much like grants which a public body might create in order to benefit its constituency. Accordingly, we conclude that employees and board members of the Downtown Business Association and the Chamber of Commerce are not consultants and need not be included in the City's conflict of interest code.

Approved by the Commission on September 6, 1978.
Concurring: Lapan, McAndrews, Quinn and Remcho. Chairman Lowenstein was absent.


T. Anthony Quinn